UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

BUCK CONSTRUCTION, LLC

Employer

and

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO/CLC PAINTERS DISTRICT COUNCIL 711

Case 4–RC–21467

Petitioner-Painters

and

NEW JERSEY REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Intervenor

BUCK CONSTRUCTION, LLC

Employer

Case 4-RC-21476

and

NEW JERSEY REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Petitioner-Carpenters

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTION TO ELECTION AND CHALLENGED BALLOT

Before: Margarita Navarro-Rivera, Hearing Officer

Appearances:

For the Petitioner-Painters:

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For the Employer:

None

STATEMENT OF THE CASE

Pursuant to a Decision and Directions of Elections issued by the Regional Director on September 25, 2008, in Cases 4-RC-21467 and 4-RC-21476, representation elections were conducted by secret ballot on October 23, 2008 in each of the two units described in the respective Notices of Election. Timely Objections to conduct affecting the results of the election in Case 4-RC-21467 were filed by the Painters[1]. On November 26, 2008, the Acting Regional Director approved a Stipulation by the parties to conduct a second election in the unit in Case 4-RC-21467. Pursuant to the Stipulation, a second election was conducted by an agent of the National Labor Relations Board on December 22, 2008. The Tally of Ballots, copies of which were made available to the parties on December 22, 2008, showed the following results:

Approximate number of eligible voters 5
Void ballots.....0

[1] The terms Painters and Petitioner are used interchangeably in this report.

Votes cast for Petitioner.....2
Votes case for the Intervenor.....2
Votes cast against participating labor organization.....0
Valid votes counted.....4
Challenged ballots.....1
Valid votes counted plus challenged ballots.....5

The challenged ballot is determinative of the results of the election.

On December 29, 2008, the Intervenor[2] in Case 4-RC-21467 timely filed an Objection to conduct affecting the results of the second election. The Objection alleges as follows:

> During the critical period following the filing of the representation petition, International Union of Painters and Allied Trades, District Council 711 ("Painters") made threats to employees designed to coerce them from voting for the Carpenters, including threatening that if they voted for the Carpenters in the election they would be required to pay the Painters $10,000 for the cost of their apprenticeship.

Pursuant to paragraph 7 of the Agreement and Section 102.69 of the Board's Rules and Regulations, a preliminary investigation of the Challenged Ballot and the Objection was conducted under the direction and supervision of the Regional Director. On January 22, 2009, the Regional Director issued a Notice of Hearing on Challenged Ballot and Objection to Election directing that a hearing be held to take testimony and resolve the factual issues presented by the Challenged Ballot and the Objection. Pursuant to the Regional Director's Notice of Hearing, a hearing was held before me on February 20, 2009, in Philadelphia, Pennsylvania.

At the hearing, all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, and to file post-hearing briefs. As

[2] The terms Intervenor and Carpenters are used interchangeably in this report.

indicated above, the Employer did not appear at the hearing. Both the Painters and the Carpenters filed post-hearing briefs.

The Intervenor challenged the ballot of Dawn Hartzell on the ground that she is not an eligible voter because she is not presently employed in the trade. The Regional Director's preliminary investigation revealed that Hartzell, an apprentice of the Painters, met the criteria for eligibility under *Steiny & Co.*, 308 NLRB 1323 (1992) and *Daniel Construction,* 133 NLRB 264 (1961); had been injured on the job and was receiving workers' compensation; and had not yet returned to work. The Intervenor asserted at the hearing that Hartzell's post election application for permanent disability, coupled with her failure to work in the trade for over a year, indicates that she has no reasonable expectation of continued employment with the Employer, and no intention to return to work in the tapers' trade. The Painters assert that Hartzell is an eligible voter because she has been out on sick leave, remains an officially registered apprentice, and has not quit voluntarily, or been terminated by the Employer.

Based on the evidence presented at the hearing, including the testimony of the witnesses and my assessment of their demeanor, as well as the post hearing briefs, I have decided as more fully set forth below to recommend that the Objection be overruled and that the challenge to the ballot of Dawn Hartzell be overruled[3].

[3] I have reviewed and weighed all testimony in light of the entire record. The facts found in this report are based upon the record as a whole as well as my observation of the witnesses. Contrary testimony not specifically mentioned has not been disregarded but has been rejected as not credible.

BACKGROUND

The Employer is a commercial drywall construction company based in West Berlin, New Jersey. It constructs and finishes walls and ceilings on as many as 10 projects at a time. About 80 percent of the Employer's business consists of traditional carpentry work of framing walls and installing drywall, and about 15 percent is taping and finishing work. About two-thirds of the taping and finishing work is subcontracted to other contractors, and the rest is completed by the Employer's employees. The Employer has maintained Section 9(f) agreements with both the Painters and the Carpenters. Both the Painters and the Carpenters filed petitions with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent different units of the Employer's employees. In Case 4-RC-21467, the Painters petitioned for a unit of the Employer's tapers. The Carpenters intervened in that case and also filed a separate petition in Case 4-RC-21476 for a unit of the Employer's carpenters and tapers. On average, the Employer employs 30 to 45 carpenters, who are hired through the Carpenter's hiring hall, and up to five tapers, who are hired through the Painter's hiring hall.

THE OBJECTION

The Intervenor's Objection alleges that during the critical period following the filing of the representation petition, the Petitioner made threats to employees designed to coerce them from voting for the Carpenters, including threatening that if they voted for the Carpenters in the election they would be required to pay the Painters $10,000 for the cost of their apprenticeship.

As the proponent of election objections, the Intervenor has the burden of proving that the conduct complained of had a tendency to interfere with the employees' freedom of choice.

Double J. Services, 347 NLRB No. 58 (2006). That burden is a heavy one because there is a strong presumption that ballots cast under Board rules and supervision reflect the true desires of the electorate. *Safeway, Inc.*, 338 NLRB 525 (2002). As set forth below, I find that the Intervenor has not met its burden in this case.

Incident With Miguel Torres Vélez

Paul Bellardo, an Organizer employed by the Carpenters, testified that on December 19. 2008, he visited the Employer's construction site at the Season 52 Restaurant in Cherry Hill, New Jersey to talk to employee Miguel Torres Vélez. Torres Vélez works for the Employer as an apprentice taper and is a member of the Painters Union. He also attends the Painters apprentice school. According to Belardo, he was saying goodbye to Torres Vélez when he was approached in a loud and aggressive manner by Mike Kisielewski (an official employed by the Painters), Painter's Apprentice Drywall Coordinator Edward Flanagan, and two other guys whose names he did not know. Bellardo testified that they said "why you fucking talking to our guy? That's our guy you know you shouldn't be fucking talking to our guy…he's our fucking guy you don't need to be talking to him." Bellardo also testified that Torres Vélez was about 15 to 20 feet away when he was approached by the four Painter Representatives.

Torres Vélez was called to testify by the Carpenters. He testified that after his conversation with Bellardo he saw representatives from the Painters talk to Bellardo, but that he immediately left and went to work alongside employee George Hunt. Torres Vélez testified that he remembered only two individuals from the Painters talking to Bellardo and that although he could tell from the look on their faces that the conversation was distasteful, he could not hear or distinguish what was being said. Torres Vélez also testified that the Painters came to talk to him

the same way as the Carpenters came to talk to him and to share the benefits of joining their union as compared to the other union. Torres Vélez, testified that the Painters told him that if he were to join the Carpenters he would have to pay and reimburse them for up to $10,000 in cost of training him so far if he went over to the other Union. Torres Vélez did not identify any of the Painters who had spoken to him on direct examination. However on cross examination Torres Vélez identified an individual by the name of Guillermo as the person who made the statement to him. Torres Vélez testified that the day after this conversation with the unnamed Painters Representatives he talked to Painters Representatives Harry Harchetts, Edward Flanagan and Joe Barry because he had doubts about the truth of the statement that had been made to him the day before. Harry Harchetts is employed by the Painters as the Business Manager/Secretary-Treasurer and Joe Barry is employed as a business agent. Flanagan as stated above, is the Drywall Apprentice Coordinator. Harchetts assured Torres Vélez that the statement was not true and he also said that he had no idea why they would make such a statement to him.

George Hunt an employee who was called to testify by the Carpenters testified that he was at the other end of the room about 150 to 200 feet away from Belardo when Belardo was approached by the Painters representatives. Hunt testified that three or four Painters representatives spoke to Torres Vélez for 15 or 20 minutes but he could not hear what was being said. He went up to Torres Vélez about 10 minutes after the Painters Representatives left. According to Hunt, Torres Vélez said that he could not vote for the Carpenters because he was going to have to pay a training fee. Hunt testified that he told Torres Vélez that they could not do that and that he had a right to vote for whoever he wanted to vote for.

Edwin Arlequin was called to testify by the Painters. Arlequin is not employed by the Painters. He is a member of one of the Painter Locals and has been used by the Painters to serve as an interpreter in other Painter campaigns. He does serve as a delegate, a non paid union position, and as delegate he attends council meetings and reports back to his membership. He has also served as a union steward for his local at some of the job sites where he has worked. He served on the Painters political action committee for the 2008 presidential election and was paid for his participation in that committee. He has not been on the Union's payroll since then. Arlequin testified that December 18 or 19, 2008, he accompanied Painters Representatives Mike Kisielewski and Ed Flanagan to the Season 52 Restaurant job site in Cherry Hill, New Jersey to serve as interpreter. Arlequin spoke to Torres Vélez in Spanish and told him that he should take into consideration the amount of money that the Painters had spent on him $10,000 when he went to vote that he should take into consideration when he went to vote that the Painters had spent a lot of time with him and that they would always be there for him. Arlequin testified that he told Torres Vélez that he could vote the way he wanted to vote. Arlequin denied that he told Torres Vélez that he would have to pay the money back. Arlequin testified that he translated what Ed Flanagan said. According to Arlequin Ed Flanagan told him to reassure Torres Vélez and to take into consideration the amount of time and money the Painters had spent so far in educating him and to take that into consideration when he went to vote and that he could vote the way he wanted to vote. Arlequin also testified about the conversation between the Painters Representatives and Belardo. He testified that he did not approach Belardo in an aggressive manner, that Belardo held his ground. Arlequin denied that and that neither he nor Mike Kisielewski ever used the word "fucking guy" during the conversation. Arlequin finally testified

that the job site was very loud because of all the machines being operated on the job and that as a result Kisielewski had to speak louder in order to be heard.

Edward Flanagan testified that in December the Wednesday before the election he visited the job site to talk to Torres Vélez about the upcoming vote. He was accompanied to the job site by Mike Kisielewski and Edwin Arlequin who served as interpreter. Flanagan testified that the job site was very loud because of all the equipment that was being operated and that they had to speak loudly in order to be heard. He described the incident with Belardo as a respectful discussion ending by Kisielewski giving his business card to Belardo. Flanagan testified that there was no profanity during the encounter with Belardo. After the discussion with Belardo Flanagan and Arlequin approached Torres Vélez at the baker's rack where he was working and spoke to him for about 5 minutes. According to Flanagan he told Miguel (through Arlequin) that the Painters had a lot of time invested in him and that he was the future of the Union. Flanagan testified that he did not tell Arlequin to say anything about the amount of money it had cost to train Torres Vélez. Flanagan also testified that on the Friday before the election Torres Vélez spoke with Harchetts, Barry and Flanagan and asked if he was going to be charged $10,000 if he voted for the Carpenters. According to Flanagan they told Torres Vélez "that is not going to happen that is not our policy. Vote, we hope you vote for us but vote – you're going to vote the way you're going to vote. We can't change anyone's mind."

DISCUSSION AND ANALYSIS CONCERNING THE OBJECTION

In determining whether a party's conduct warrants setting aside an election, it is necessary to determine whether the particular conduct reasonably tended to interfered with the free and uncoerced choice in the election. *Baja's Place, Inc*., 268 NLRB 868 (1984). I credit the

testimony of Arlequin and Flanagan concerning the incident with Miguel Torres Vélez. Torres Vélez appeared uncomfortable during his testimony and unsure of what was said to him by Arlequin (whom he mistakenly identified as Guillermo). His testimony that the Painters told him that he would have to pay back $10,000 was not convincing. He was already a member of the Painters Union and I do not believe that the Painters would have made such a statement to him before the election as they would want his support and they would not want to risk losing his support. On the other hand Arlequin credibly testified that he told Torres Vélez that he should take into consideration the amount of money ($10,000) that the Painters had spent on him when he went to vote and to take into consideration that the Painters had spent a lot of time with him and that they would always be there for him. Arlequin was a forthright witness who testified honestly about the conversation with Torres Vélez. Thus, I credit Arlequin's testimony that he did not tell Torres Vélez that he would have to pay the money back if he voted for the Carpenters. I also credit Flanagan's testimony about this conversation with Torres Vélez. Flanagan testified that he told Arlequin to tell Torres Vélez that the Painters had a lot of time invested in him and that he was the future of the Union, but he did not tell Arlequin to say anything about the amount of money it had cost the Painters and I credit his testimony. He was genuinely surprised to find out at the hearing that Arlequin had said something to Torres Vélez about the $10,000. He did not try to dispute Arlequin's testimony but rather acknowledged that Arlequin had apparently mentioned the money to Torres Vélez. I am convinced that Torres Vélez misunderstood Arlequin's comment to him as he appeared to be confused and unsure of his testimony. Additionally, he testified that he "had doubts" about what Arlequin had said to him, so the day after the alleged statement was made to him he asked Harry Harchetts (the head of the Painters) if the statement was true and Harry assured him that the statement was not true

and that he had no idea why he would have been told that. Moreover, the Intervenor presented no evidence that Arlequin had any control over the Painters apprentice program or any say in the charging of fees for members. Thus I find it improbable that Torres Vélez could reasonably believe that Arlequin had the ability to carry out the alleged threat to charge Torres Vélez the money the Painters had spent on the apprenticeship program for him. See *Bonanza Aluminum Corporation,* 300 NLRB 584 (1990). Under these circumstances, I find that the alleged threat made by Arlequin to Torres Vélez would not reasonably tend to interfere with the employees' free and uncoerced choice in the election. Thus, I recommend that the Intervenor's Objection be overruled[4].

THE CHALLENGE TO THE BALLOT OF DAWN HARTZELL

As stated above the Intervenor challenged the ballot of Dawn Hartzell and asserts that Hartzell is not an eligible voter because she is not presently employed in the trade. The Intervenor asserted at the hearing that Hartzell's post election application for permanent disability, coupled with her failure to work in the trade for over a year, indicates that she has no

[4] Although the Intervenor does not contend that the incident involving Bellardo and the Painters Representatives constitutes grounds for setting aside the election, a little time was spent at the hearing adducing testimony from Bellardo about the incident, thus I feel compelled to address the incident. I discredit Belardo's account of the incident, his account of the incident was exaggerated and he seemed bent on making it more serious than it actually was. Even if I were to credit Belardo's version of the incident, there was no evidence that the Painters threatened Bellardo in any way or that employees heard the conversation between Belardo and the Painters Representatives. George Hunt testified that he was 150 to 200 feet away from the Painters and Bellardo since Torres Vélez testified that after his conversation with Bellardo he went to work alongside the employee with whom he was working that day (that is Hunt) I conclude that Torres Vélez was also 150 to 200 feet away. As the record established that the work side was very loud with all the equipment operating that day, I find it inconceivable that any employee could have heard the conversation between Belardo and the painters. Thus I conclude that any comment the Painters may have made to Belardo did not affect the results of the election because Belardo was not an eligible voter and there is no evidence that any statements made by the Painters were disseminated to any eligible voter.

reasonable expectation of continued employment with the Employer, and no intention to return to work in the tapers' trade.

Dawn Hartzell testified that she worked for the Employer as an apprentice taper from July 2007 until November 19, 2007, when she was injured on the job. Hartzell received Workers Compensation benefits until December 8, 2008 when the benefits stopped. Hartzell testified that she never received notice from Workers Compensation of the reasons why her benefits stopped. Hartzell testified that she had surgery in April 2008 and was under the surgeon's care until October 6, 2008, at which time the surgeon placed her on light duty status. Her doctor ordered additional physical therapy for her, but the insurance carrier did not return numerous calls from Hartzell and her doctor seeking approval for the physical therapy. She tried to get her own insurance company to cover the physical therapy but her insurance company denied it because her Workers Compensation case is still open. Hartzell testified she does not believe that she is permanently disabled but in January 2009 she applied for permanent disability because she is not eligible for unemployment compensation and she had no source of income and has a 16 year old daughter to support. Hartzell also testified that she believes that once she gets the physical therapy ordered by her doctor she will be able to return to work and that she would like to go back to work as a taper. Hartzell also testified it is her intention to complete physical therapy once it is approved and that once she recovers she intends to work in the trade. Hartzell further testified that she was never given a notice of termination by the Employer, that she never resigned her employment, that she has remained in contact with the Employer, that she intends to return to the Union and to be sent out on jobs by the Union and that if the Union sends her back to work for the Employer she would go back to work for the Employer.

Edward Flanagan testified that Hartzell came to the Union in July 2007 and that she went to work for the Employer and completed her first week of apprentice training in September 2007. She also attended and completed second week of apprentice training in December 2007. She did not participate in the hands on aspect of the program because of the on-the-job injury she had sustained. Flanagan testified that when an employee is out on disability or Workers Compensation their school training is suspended and until they are released and able to perform the work. Hartzell will be eligible to return to the school when she is released. Flanagan also testified that Hartzell is still carried in the Union's records and with the federal government data base as a registered apprentice. Hartzell testified that he has the authority to remove an employee from the federal government's registered apprentice records. He gave the example of an apprentice who he removed from the government's records because she resigned from the apprentice program. Flanagan does not remove an apprentice who has been injured from the government's data base.

DISCUSSION AND ANALYSIS CONCERNING THE CHALLENGE TO THE BALLOT OF DAWN HARTZELL

An employee on sick or disability leave is presumed to be an eligible voter absent an affirmative showing that the employee has resigned or has been discharged. *Red Arrow Freight Lines*, 278 NLRB 965 (1986); *Pepsi Cola Co*., 315 NLRB 1322 (1995). The *Red Arrow* standard was reaffirmed by the Board in *Home Care Network, Inc*., 347 NLRB 859 (2006). The Intervenor takes the position that the expectancy of future employment standard should be applied and that Hartzell should be found ineligible under that standard. I find that the facts here do not warrant a departure from or an expansion in application of the Board's well established

Red Arrow rule. The record established that Hartzell has been on sick leave since November 2007 when she sustained a work related injury. Although Hartzell got no notice when her disability payments ceased in December 2008, the record indicates that the payments probably stopped because her surgeon's last report indicated that she could perform light duty work. Hartzell has a permanency evaluation scheduled for April 9, 2009 presumably to determine whether or not her Workers Compensation benefits should continue. The record does not support the Intervenor's assertion that Hartzell is at maximum medical improvement and cannot return to work. Hartzell did not resign from her job nor has she been terminated by the Employer. Hartzell keeps in contact with the Employer and hopes to be able to return to work once she gets the physical therapy ordered by her surgeon. Additionally, Hartzell remains a registered apprentice in the union's records as well as the government's data base of registered apprentices and expects to return to work once she has completed the physical therapy her doctor ordered.

The Intervenor argues that Hartzell is not eligible under *Steiny & Co*., 308 NLRB 1323 (1992) and *Daniel Construction Co*., 133 NLRB 264 (1961) because she did not work for the Employer during the 12 months preceding the second election, a precondition for her eligibility under the *Daniel* formula to consider her work in the second year preceding the election. I reject the Intervenor's assertion. The Decision and Direction of Election issued by the Regional Director on September 28, 2008, states "those employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months, or who have had some employment in that period and have been employed for a total of 45 working days within the 24 months preceding the payroll period ending immediately preceding the date of this Decision, and also have not been terminated for cause or quit voluntarily prior to the completion of the last job

for which they were employed[5]." Hartzell voted in the election because she met the criteria for eligibility under *Steiny* and *Daniel.* Thus Hartzell is an eligible voter unless the Employer terminated for cause or she quit voluntarily. The record established that Hartzell was not terminated by the Employer and that she has not voluntarily quit her job. I reject the Intervenor's argument it its brief that the eligibility date is the date of the second election (December 22, 2008). The eligibility date established by *Daniel* is "the payroll period immediately preceding the date of the issuance of the Regional Director's Notice of Second Election" as the date to determine eligibility. See *Daniel*, at 1081. In the instant case, the record does not contain the date of the Regional Director's Notice of Second Election, however the record discloses that the Regional Director approved the Stipulation to set aside the first election on November 26, 2008. Presumably the payroll eligibility date would be sometime in November 2008. The record discloses that Hartzell worked for the Employer 128 hours in November 2007. Thus, Hartzell had some employment in the year immediately preceding the eligibility date and worked 496 hours (more than 45 days) for the Employer in the 24 months immediately preceding the eligibility date. Accordingly, I find that Hartzell is eligible to vote and I recommend that her ballot be opened and counted.

CONCLUSION AND RECOMMENDED ORDER

In accordance with the above findings, I recommend that the Intervenor's Objection be overruled. I also recommend that the challenge to the ballot of Dawn Hartzell be overruled and that her ballot be opened and counted.

Under the provisions of Section 102.69 of the Board's Rules and Regulations, within 14 days from the date of issuance of this report, any party may file an original and 8 copies of

[5] *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction,* 133 NLRB 264 (1961), modified in 167 NLRB 1078, 1081 (1967).

exceptions to this report with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. A request for review may also be submitted by electronic filing. See the Attachment provided in the initial correspondence in this case or refer to OM05-30 and OM07-07, which are available on the Agency's website at www.nlrb.gov, for a detailed explanation of requirements which must be met when electronically submitting documents to the Board and Regional Offices. A copy of the exceptions must be served on each of the other parties to the proceeding and with the Regional Director either by mail or electronic filing. Guidelines for electronic filing can also be found under the **E-Gov** heading on the Agency's website. This request may not be filed by facsimile. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer.

Signed: March 19, 2009 at Philadelphia, Pennsylvania

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MARGARITA NAVARRO-RIVERA
Hearing Officer
National Labor Relations Board, Fourth Region